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ANIMUS AND ITS ALTERNATIVES: CONSTITUTIONAL PRINCIPLE AND JUDICIAL PRUDENCE

Daniel O. Conkle*

In his important book, Professor William D. Araiza has explained, defended, and elaborated a doctrine of unconstitutional animus.¹ Based largely on the Equal Protection Clause of the Fourteenth Amendment,² this doctrine rules out, as constitutionally impermissible, laws and other governmental actions that are motivated by animus. As Araiza explains, when government acts on the basis of animus, it neither advances, nor even attempts to advance, a public-regarding interest or objective.³ Instead, it acts on the basis of nothing more than bias, dislike, or disfavor toward the group of people who are targeted by the law, treating that group as subordinate, inferior, or unworthy simply because of who they are.⁴

* © 2019 by Daniel O. Conkle. Robert H. McKinney Professor of Law Emeritus, Indiana University Maurer School of Law; Adjunct Professor of Religious Studies, Indiana University Bloomington. This Essay is a revised and expanded version of a symposium paper that I presented at Stetson University College of Law on April 20, 2018. I am grateful to the College of Law for sponsoring the symposium, to Professor William D. Araiza for inviting me to participate, and to my fellow symposium participants for their comments and insights.

1. WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* (2017). Somewhat similar but distinctive arguments have been made by others, including Professors Dale Carpenter and Susannah W. Pollvagt. See Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183; Susannah W. Pollvagt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

2. U.S. CONST. amend. XIV, § 1.

3. For Araiza, the “fundamental goal” of animus doctrine is “to ensure that [legislation and other governmental action] promotes a public purpose, or at least seeks to.” ARAIZA, *supra* note 1, at 175; see *id.* at 151 (“[A]nimus doctrine’s underlying concern [is] ensuring that government decision making is motivated by legitimate, public-regarding goals.”).

4. Thus, “the fundamental question animus doctrine asks” is this: “Is the law *really* aimed at burdening a group for its own sake, out of simple disapproval of that group as human beings?” *Id.* at 142–43. See *id.* at 87–88 (explaining that animus can be uncovered through an objective inquiry into “constructed” intent, but noting that subjective dislike remains the reference point); see also *id.* at 7 (“[S]ubjective dislike of a group lies at the core of legislation we can legitimately condemn as based in animus.”); Carpenter, *supra* note 1, at 185 (suggesting that animus doctrine constitutionalizes a governmental “duty not to act

According to Araiza, animus-based governmental action is categorically unconstitutional.⁵ There is no need to show that the animus is linked to purposeful discrimination on a constitutionally forbidden ground, such as race under the Equal Protection Clause or religion under the First Amendment.⁶ Instead, animus is an independent constitutional violation.⁷ Nor can animus-based lawmaking ever be justified, not even under constitutional strict scrutiny.⁸ Rather, as Professor Susannah W. Pollvogt has explained, animus acts as “a doctrinal silver bullet,” meaning that “no law found to be based in animus should be permitted to stand.”⁹

To date, the Supreme Court has relied on animus as an independent basis for constitutional invalidation in four cases—what Professor Dale Carpenter has called “an animus quadrilogy.”¹⁰ First, in its 1973 decision in *United States Department of Agriculture v. Moreno*,¹¹ the Court found that a federal food-stamp restriction was tainted by “a bare congressional desire to harm a politically unpopular group,” namely, “hippies” who were forming households of unrelated individuals.¹² Second, in 1985, the Court in *City of Cleburne v. Cleburne Living Center*¹³ found that a Texas city’s decision to deny a group-home zoning permit “rest[ed] on an irrational prejudice against the mentally

maliciously toward a person or group”); *id.* at 245 (“Animus is a desire to disparage and to injure a person or group of people.”); *cf.* Pollvogt, *supra* note 1, at 926 (urging a broader view of animus, according to which “animus is present where the public laws are harnessed to create and enforce distinctions between social groups—that is, groups of persons identified by status rather than conduct”).

5. ARAIZA, *supra* note 1, at 105–19.

6. The First Amendment’s Establishment and Free Exercise Clauses generally forbid purposeful discrimination favoring or disfavoring either religion in general or any particular religion. *See* DANIEL O. CONKLE, RELIGION, LAW, AND THE CONSTITUTION 57–60 (2016) (explaining these constitutional prohibitions).

7. To be sure, assertions of animus *can* be linked to claims of purposeful discrimination on a constitutionally forbidden ground. *See, e.g.,* Trump v. Hawaii, 138 S. Ct. 2392, 2416–23 (2018) (considering, but rejecting under deferential review, a claim that presidential travel restrictions were motivated by animus and therefore were purposefully designed to discriminate against Muslims in violation of the Establishment Clause); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719, 1729–32 (2018) (finding that a state civil rights commission violated the Free Exercise Clause when it acted with hostility toward a Christian baker who had objected on First Amendment grounds to creating a custom wedding cake for a same-sex couple). However, no such linkage is required.

8. ARAIZA, *supra* note 1, at 105–19.

9. Pollvogt, *supra* note 1, at 930, *quoted in* WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 117–18 (2017).

10. Carpenter, *supra* note 1, at 183.

11. 413 U.S. 528 (1973).

12. *Id.* at 534.

13. 473 U.S. 432 (1985).

[disabled], including those who would occupy the [proposed] facility.”¹⁴ Third, in *Romer v. Evans*,¹⁵ a 1996 decision, the Justices concluded that a Colorado state constitutional amendment barring anti-discrimination protections for gays, lesbians, and bisexuals was “inexplicable by anything but animus toward the class it affects.”¹⁶ And finally, in *United States v. Windsor*,¹⁷ decided in 2013, the Court found that the Defense of Marriage Act, which adopted a federal definition of marriage that excluded same-sex couples, was animus-based because it was intended by Congress to “injure,” “disapprov[e],” “stigma[tize],” “demean,” and “degrade” same-sex married couples.¹⁸

With these cases providing the backdrop, this Essay will focus on animus as an independent constitutional violation and on the propriety of the Supreme Court’s invocation of this doctrine. More specifically, it will evaluate the doctrine of animus, as articulated by Professor Araiza, from each of two perspectives: first, as a matter of constitutional principle, and second, as a matter of judicial prudence. By constitutional principle, I mean principle or principles that can fairly be derived from the Constitution, taking proper account of historical and evolving values and relevant judicial precedents.¹⁹ Constitutional principles embody the meaning of the Constitution, including, in this case, the Equal Protection Clause.²⁰ By judicial prudence, I mean judicial regard for other factors, apart from constitutional principles pure and simple, in the formulation of constitutional doctrine.

Two prudential factors are highly relevant here. The first is judicial workability. This consideration addresses practical considerations, asking whether a particular doctrinal formulation reflects rules or standards that courts are well-suited to apply in a competent, coherent, and consistent manner. The second is judicial statesmanship. This factor addresses more subtle but equally important matters of judicial discretion and judgment. Judicial statesmanship is an appropriate consideration for the Supreme Court, which is, after all, not only a court but also the principal

14. *Id.* at 450.

15. 517 U.S. 620 (1996).

16. *Id.* at 632.

17. 570 U.S. 744 (2013).

18. *Id.* at 751, 768, 769, 770, 772, 774.

19. So understood, constitutional principles can be originalist or non-originalist.

20. U.S. CONST. amend. XIV, § 1.

steward of our Constitution. Through its decisions, the Court enforces constitutional principles that emerge from particular constitutional provisions. But the Court plays a broader role in our constitutional democracy, a role that transcends its particular holdings. The Court's opinions—readily accessible to the public, now more than ever—speak to political actors and citizens. And what the Court says matters. It can influence the character, vibrancy, and durability of our democratic system.

To anticipate my conclusion, I will argue that animus doctrine is sound as a matter of constitutional principle but highly problematic as a matter of judicial prudence—in part due to workability concerns, but especially from the standpoint of judicial statesmanship. As a result, I will contend that animus should be a doctrine of last resort, to be invoked only when there is no viable and preferable doctrinal alternative.

I. EVALUATING ANIMUS DOCTRINE

From the standpoint of constitutional principle, Professor Araiza's argument is compelling. Properly understood, the Constitution, including the Equal Protection Clause, precludes animus-based lawmaking. As Araiza notes, even Justice Scalia—who harshly criticized the Court's animus rulings in *Romer*²¹ and *Windsor*²²—conceded that “it is our moral heritage that one should not hate any human being or class of human beings,”²³ much less enact that hatred into law. More generally, the prohibition on animus-based lawmaking is part of a broader constitutional principle, one that prohibits what Professor Cass R. Sunstein once called “naked preferences.”²⁴ In other words, the Constitution demands that every law serve a public-regarding interest or objective or, at a minimum, that it at least be intended to do so. As Araiza argues, this requirement connects historically not only to James Madison's concerns about factions, as expressed in the *Federalist Papers*,²⁵ but also to the “class legislation”

21. See *Romer*, 517 U.S. at 636–53 (Scalia, J., dissenting).

22. See *Windsor*, 570 U.S. at 791–802 (Scalia, J., dissenting).

23. *Romer*, 517 U.S. at 644 (Scalia, J., dissenting), quoted in WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 79 (2017).

24. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

25. See ARAIZA, *supra* note 1, at 11–14.

jurisprudence of the nineteenth century.²⁶ As a matter of constitutional principle, Araiza is right: animus-based lawmaking violates deep-seated constitutional understandings and should be regarded as categorically impermissible.

Although a doctrine of unconstitutional animus is thus persuasive, indeed compelling, as a matter of constitutional principle, such a doctrine raises significant issues of judicial prudence. Professor Araiza concedes that the doctrine raises potential difficulties along these lines, and he attempts to address them, albeit without using the precise terminology or inquiry I have proposed.²⁷ Again, I have suggested that the inquiry into judicial prudence requires the consideration of two factors: judicial workability and judicial statesmanship.

With respect to judicial workability, Araiza does not deny that if we look only to the Supreme Court's own statements, animus doctrine may seem amorphous and difficult to apply.²⁸ But he goes beyond (or beneath) the Court's language to construct an explanatory doctrinal framework, suggesting that this framework is consistent with the Court's animus rulings and much of its reasoning.²⁹ In other words, he argues that animus doctrine can and should be understood as he suggests.

In particular, Araiza contends that the Court's animus inquiry, properly understood, is analogous to its use of the *Arlington Heights*³⁰ evidentiary framework and burden-shifting approach for resolving claims of purposeful racial discrimination under the Equal Protection Clause. The Court relies on that framework in evaluating assertions that the government has intentionally discriminated on the basis of race even when it

26. See *id.* at 14–28.

27. See *id.* at 73–75 (discussing aspects of what I am calling judicial workability); *id.* at 128–31, 156–57 (discussing aspects of what I am calling judicial statesmanship).

28. See *id.* at 73–75 (highlighting doctrinal ambiguities, inconsistencies, and tensions).

29. See *id.* at 75 (explaining that the “raw materials” of the Court's animus decisions can be used “to construct a coherent structure”).

30. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

claims that it has not.³¹ Araiza contends that a similar, but not identical, approach governs here.³²

According to Araiza, the challenger in an animus case, as in the *Arlington Heights* situation, can rely on various sorts of direct and circumstantial evidence, including the adverse impact of the governmental action, its historical background, specific evidence in the legislative or administrative record, and/or substantive or procedural departures from standard legal practices.³³ Based on evidence of this kind, the challenger is required to show that “animus *may be lurking* as a motivation for the challenged action.”³⁴ If the challenger makes that showing, the burden shifts to the government, which can rebut the suggestion of animus only by demonstrating, under a heightened form of rational basis review, that the law in fact was designed to serve one or more legitimate, public-regarding interests.³⁵

Araiza explains that animus might be found in the subjective motivations of lawmakers, in their implementation of constituent biases, or on the basis of other contextual considerations.³⁶ In any event, if the *Arlington Heights*-like inquiry leads the Court to conclude that a law indeed was animus-based, the law is not merely presumed to be unconstitutional; that is, a finding of animus does not merely trigger heightened scrutiny, whether strict or intermediate. Instead, an animus-based law is categorically unconstitutional, and the government simply cannot overcome this finding.³⁷

Professor Araiza’s doctrinal (re)formulation is a helpful response to the problem of workability. One might complain that it is Araiza’s doctrine—not the Court’s. But as Araiza explains, his conceptualization is largely, if not entirely, consistent with what

31. Under *Arlington Heights*, the equal protection challenger initially must show that race was “a motivating factor” in the government’s decision-making process. *Id.* at 265–66. If the challenger makes that showing, the burden shifts to the government, which, to avoid a finding of purposeful racial discrimination, must demonstrate “that the same decision would have resulted even had the impermissible purpose not been considered.” *Id.* at 270–71 n.21.

32. See ARAIZA, *supra* note 1, at 7 (noting that “the factors the Court uses to uncover discriminatory intent also help uncover animus” but “the animus investigation is slightly different”).

33. *Id.* at 89–104, 120–38.

34. *Id.* at 139 (emphasis added).

35. *Id.* at 139–43.

36. *Id.* at 74, 138.

37. *Id.* at 105–19.

the Court itself has said and done. Araiza's interpretation and elaboration of the Court's doctrine is entirely reasonable, and it is a substantial improvement on the Court's own articulations, giving animus doctrine considerably greater clarity and coherence. Even so, questions of workability remain, notably including the core definitional question: exactly what counts as forbidden animus?³⁸

For example, what if the belief in question is a religious belief about human nature or personal morality? In the context of homosexuality, *Lawrence v. Texas*³⁹ ruled out personal morality, including religious morality, as a basis for criminalizing homosexual conduct.⁴⁰ More to the point, the Court in *Windsor* suggested that congressional reliance on similar religious and moral claims supported its conclusion that the Defense of Marriage Act was animus-based.⁴¹ But *Windsor*'s finding of animus depended on other considerations as well,⁴² and the Court in *Obergefell v. Hodges*,⁴³ even as it embraced marriage equality, conspicuously declined to "disparage" what it called "decent and honorable religious or philosophical" opposition to same-sex marriage.⁴⁴

More generally, religious beliefs about human nature or personal morality are not easily equated with animus, at least not invariably, in that they do not necessarily entail hatred, dislike, or disfavor for a group of people as such. Such beliefs (whether sound or misguided) typically reflect religious perspectives about how people should live their lives and structure their interpersonal relationships. The beliefs might disapprove competing paths,

38. Cf. Carpenter, *supra* note 1, at 184 ("There is little consensus about what animus is.").

39. 539 U.S. 558 (2003).

40. *Id.* at 571, 577–78.

41. As support for its animus ruling in *Windsor*, the Court cited a congressional report "express[ing] both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." United States v. Windsor, 570 U.S. 744, 771 (2013) (quoting H.R. REP. NO. 104-664, at 16 (1996)).

42. See *id.* at 764–75 (emphasizing the broad reach and adverse effects of the challenged provision and its unusual interference with state-law definitions of marriage).

43. 135 S. Ct. 2584 (2015).

44. *Id.* at 2602. After making this observation, the Court continued, seemingly shifting from the motivation or purpose underlying marriage prohibitions to a concern about their exclusionary and stigmatizing effect on same-sex couples: "But when . . . sincere, personal opposition [to same-sex marriage] becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id.*

regarding those paths as less desirable, wrong, or even, in religious terms, sinful. When are such beliefs “decent and honorable” and when are they animus-based?⁴⁵ To be sure, one might argue that the Constitution categorically forbids lawmaking on the basis of contested understandings of human nature or personal morality, however “decent and honorable” they might be, or that, in any event, such lawmaking is always impermissible if the understandings are religious in derivation.⁴⁶ But without some further explanation or clarification it seems tendentious to describe the lawmaking as animus-based.⁴⁷

Even if animus can be defined appropriately and with sufficient clarity, there remains the problem of mixed motives or mixed purposes⁴⁸—a problem that arises when a law is based in part on animus but in part on other, public-regarding objectives. As noted earlier, Araiza argues that if a challenger can show that animus may have been lurking as the motivation for a law, the

45. Consider the traditional religious adage, “Hate the sin, love the sinner.” Cf. Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 683 (2014) (“[I]f we are to live peacefully and with mutual respect in a morally pluralistic society, it is imperative that we be able to approve or disapprove of different kinds of conduct, or even of different ways of life, without thereby being deemed to have depreciated the humanity of people who live in ways we disapprove.”).

46. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (reading the First Amendment’s Establishment Clause to require that lawmaking be supported by a “secular legislative purpose”); cf. Gary J. Simson, *Religion by Any Other Name? Prohibitions on Same-Sex Marriage and the Limits of the Establishment Clause*, 23 COLUM. J. GENDER & L. 132, 179–84 (2012) (arguing that a reasonable observer would conclude that same-sex marriage prohibitions endorsed religion in violation of the Establishment Clause, a legislative objective that was unconstitutional but that was not based in animus); *id.* at 181, 184 (noting that, unlike a finding of animus, a finding that lawmakers improperly endorsed religion does not disparage the lawmakers as “fundamentally bad people” but instead permits the possibility that their legislative action was wrong but “well-intentioned”).

47. Professors Carpenter and Pollvogt have addressed the relationship between animus and morality, including religious morality, both in the context of homosexuality and more generally. Professor Carpenter has argued that “[i]t is unconstitutional animus for the government to target homosexuals simply because it morally disapproves of homosexuality.” Carpenter, *supra* note 1, at 188. More broadly, he suggests that “moral condemnation expressed in law” should be treated as animus-based when “experience and empirical learning” have undermined the underlying moral perspective, revealing it to be “a *prejudice*, an unthinking and anachronistic holdover from an earlier time.” *Id.* at 240. Professor Pollvogt agrees that “bare moral disapproval of homosexual conduct or homosexual identity” should be equated with animus. Pollvogt, *supra* note 1, at 891, 921–24. But she goes beyond Carpenter in concluding, more generally, that laws should be treated as animus-based when “they function to express and enforce private bias against a particular social group, regardless of whether that bias itself is widely held or based in moral or religious considerations” and without “distinguish[ing] between ‘legitimate’ and ‘illegitimate’ biases.” *Id.* at 907 & n.105.

48. One might distinguish motives from purposes, but in the current discussion I am treating these concepts interchangeably.

government must respond by demonstrating, under a heightened form of rational basis scrutiny, that the law in fact was designed to serve one or more other, legitimate purposes.⁴⁹ But what if that scrutiny leads a court to conclude that animus and non-animus objectives *both* contributed to the law's enactment?

If the *Arlington Heights* approach is adopted here, the ultimate question is whether animus was a determinative, but-for reason for the law's adoption.⁵⁰ In other words, was animus essential to the law's enactment, or would the law have been enacted anyway, on the basis of other, public-regarding objectives? It is not clear that Araiza endorses the but-for test in the animus context. At one point, citing Professor Carpenter,⁵¹ he implies that perhaps the ultimate question in a mixed-motives case is somewhat different: whether animus "strongly" or "materially" influenced the law's adoption.⁵² In any event, the judicial resolution of mixed-motives questions—whether under the but-for test or some other standard⁵³—will often be fraught with difficult questions of fact and judgment, raising significant workability concerns.⁵⁴

This discussion suggests that, despite Professor Araiza's helpful efforts, animus doctrine requires further clarification and elaboration before it can be declared a workable doctrine. Moreover, as I will explain, animus doctrine raises other prudential concerns, relating to what I have called judicial statesmanship.⁵⁵ In my view, these concerns, even more than workability considerations, suggest that the Supreme Court's

49. See *supra* notes 33–35 and accompanying text.

50. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 n.21 (1977) (adopting this approach in the context of discriminatory intent).

51. Like Professor Araiza, Professor Carpenter invokes the *Arlington Heights* framework to a degree. Carpenter, *supra* note 1, at 243–48. Rather than adopt the *Arlington Heights* but-for test as such, however, Carpenter suggests that animus challenges should succeed if animus "materially influenced" adoption of the law, that is, if animus was a "substantial factor in passage." *Id.* at 232. He also suggests that the burden-shifting approach of *Arlington Heights* is not directly relevant in this setting. *Id.* at 247.

52. ARAIZA, *supra* note 1, at 118 (citing Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 232); see also *id.* at 126–27 (noting that his approach is similar to Carpenter's and that "there is . . . good wisdom in recognizing that a smidgen of animus should probably not suffice to fatally infect a statute").

53. See generally Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106 (2018) (categorizing and explaining various legal approaches to mixed motives).

54. But cf. *id.* at 1113 (suggesting that, properly understood, "[m]ixed motive analysis is much easier than commonly thought").

55. Araiza acknowledges and attempts to address concerns along these lines, albeit not to the extent that he addresses workability. See ARAIZA, *supra* note 1, at 128–31, 156–57.

animus doctrine is not a prudent vehicle for invalidating laws and governmental actions—that is, assuming there is a viable and preferable doctrinal alternative.

When the Court declares that a law is based in animus, it is issuing what can fairly be described as an *indictment* of those responsible for the law. Indeed, the Court's declaration can be seen as a *moral indictment* of the lawmakers (whether legislators or citizens acting by referendum) because it implies a moral defect in their character. To refrain from hatred, animosity, and bias in the making of law is a constitutional obligation, but it is a moral duty as well, part of what Justice Scalia called "our moral heritage."⁵⁶ As Professor Carpenter has noted, animus doctrine thus reflects a "moral and sometimes constitutional duty not to act maliciously toward a person or group of people."⁵⁷ For the Court to accuse lawmakers of violating this duty is a serious charge, a form of moral condemnation.

The intensity of the Court's condemnation may vary by context. A judicial declaration of animus may be especially condemnatory if the Court is directly addressing the lawmakers' subjective motivations. As Professor Araiza suggests, the critique may be less biting if the Court instead refers to legislative reliance on the prejudices or stereotypes of constituents or to objective indicators of constructive intent.⁵⁸ Be that as it may, an accusation of animus, whatever the context, is plainly disparaging. One might attempt to redefine the word, but in both legal and general understanding, "animus" suggests a malicious sentiment that is entirely without justification.⁵⁹ Thus, when the Court declares that a law is animus-based, it is declaring—or, at a minimum, it will be understood to be declaring—that the law is based on nothing more

56. *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting), *quoted in* WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* 79 (2017). Ironically, as Professor Steven D. Smith has explained, the moral consensus on this point—combined with dissensus and disarray concerning other moral claims and perspectives—has made assertions of hatred or bias increasingly attractive in contemporary public discourse. Smith, *supra* note 45, at 690–96. According to Smith, the same dynamic may help explain—but does not excuse—the judicial tendency to rely on animus. *Id.* at 696–98.

57. Carpenter, *supra* note 1, at 185.

58. ARAIZA, *supra* note 1, at 48, 52, 58–60, 73–74, 169.

59. *See, e.g., id.* at 142–43 (equating "animus" with "simple disapproval of [a] group as human beings"); Carpenter, *supra* note 1, at 245 ("Animus is a desire to disparage and to injure a person or group of people."); *Animus*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/animus> (last visited Nov. 16, 2018) (defining "animus" as "a usually prejudiced and often spiteful or malevolent ill will").

than bias, hatred, or dislike, what the Court has called “a bare . . . desire to harm”⁶⁰ the disadvantaged group. As Chief Justice Roberts suggested in his dissenting opinion in *Windsor*, such a declaration almost inevitably “tar[s] the political branches with the brush of bigotry.”⁶¹

But what if the lawmakers *deserve* to be indicted or condemned? After all, sometimes an indictment—even a strong indictment, even a moral indictment—is *warranted*. And to my mind, animus-based lawmaking is just such a case. Not only is such lawmaking strictly forbidden as a matter of constitutional principle; it also violates widely shared notions of morality and human decency. It deserves to be not only criticized, but also condemned.

Even so, there are competing prudential considerations, linked in part to judicial workability but mainly to judicial statesmanship. As I have noted, there are difficult practical questions surrounding the precise meaning of animus, the issue of mixed motives, and the relationship between animus and traditional religious beliefs.⁶² More important, judicial declarations of animus are likely to exacerbate the animosity that infects contemporary American politics, damaging the democratic system that the Constitution is designed to protect.

America today is being torn apart by sharply worded political rhetoric and extreme political polarization, trends that are threatening the very fabric of our democracy.⁶³ Our deepest divisions are cultural—urban versus rural, elite versus populist, secular versus religious. Partisan allegiances are increasingly tribal, and political disagreements are increasingly infused with name-calling and personal attacks, treating those on the other side as not merely opponents but enemies.⁶⁴ Our divisions and animosities have reached a new and disturbing level during the tumultuous presidency of Donald J. Trump. But these trends

60. United States Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

61. United States v. Windsor, 570 U.S. 744, 776 (2013) (Roberts, C.J., dissenting).

62. See *supra* notes 38–54 and accompanying text.

63. Professors Steven Levitsky and Daniel Ziblatt highlight this concern in their recent book: “The mounting assault on norms of mutual toleration and forbearance—mostly, though not entirely, by Republicans—has eroded the soft guardrails that long protected us from the kind of partisan fight to the death that has destroyed democracies in other parts of the world.” STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 174–75 (2018).

64. See *id.* at 174 (“[I]n a polarized society, treating rivals as enemies can be useful—and . . . the pursuit of politics as warfare can be appealing to those who fear they have much to lose. But war always has its price.”).

predate the rise of Trump, and, indeed, his rise to power may be a response to these trends no less than a cause.⁶⁵

This us-versus-them political fracture is especially acute on issues of the sort that animus doctrine has addressed in the past and might address in the future—issues relating to sexual orientation and transgender rights. Invoking animus in resolving such disputes may be sound as a matter of constitutional principle, but it fans the flames of our cultural conflagrations. Ironically, a judicial declaration of animus may perpetuate and promote animus and similar sentiments in the political domain, with those so accused treating the assertion as elitist, disrespectful, insulting, and condescending. And if their values are religiously inspired, they are likely to see the charge as an assault on religion and religious liberty, deepening their sense of resentment, affront, and alienation. As Professor Steven D. Smith has suggested, “[i]t is hard to imagine a jurisprudence better calculated to undermine inclusiveness, destroy mutual respect, and promote cultural division.”⁶⁶

I do not mean to exaggerate the Supreme Court’s impact on America’s political-cultural divisions, which are the product of many and various factors. As the primary steward of our constitutional democracy, however, the Court should strive to promote, not impair, the prospect of civil and respectful political discourse. It should not take action that exacerbates our contemporary political turmoil unless the competing demands of constitutional principle imperatively require it. In my view, therefore, judicial prudence generally, and judicial statesmanship in particular, counsel against the use of animus doctrine. It should be a doctrine of last resort, to be utilized only when there is no viable and preferable doctrinal alternative. Determining whether such an alternative exists, of course, itself requires attention to matters of constitutional principle and judicial prudence.

65. According to the Pew Research Center, political polarization had surged dramatically by 2012, with most of the increase occurring during the presidencies of George W. Bush and Barack Obama. *Partisan Polarization Surges in Bush, Obama Years*, PEW RESEARCH CENTER (June 4, 2012), <http://www.people-press.org/2012/06/04/partisan-polarization-surges-in-bush-obama-years/>.

66. Smith, *supra* note 45, at 700.

II. EVALUATING DOCTRINAL ALTERNATIVES

In my judgment, the Supreme Court does have a viable and preferable doctrinal alternative in most cases involving animus claims. As I noted at the outset, to date there are only four cases—the “animus quadrilogy”⁶⁷—in which the Court has relied on animus as an independent basis for constitutional invalidation: *Moreno*,⁶⁸ *Cleburne*,⁶⁹ *Romer*,⁷⁰ and *Windsor*.⁷¹ In three of them, the Court could and should have relied instead on its established equal protection doctrine for suspect and quasi-suspect classifications. Thus, in *Cleburne*, *Romer*, and *Windsor*, the Court could and should have declared the challenged classifications—mental disability in *Cleburne* and sexual orientation in *Romer* and *Windsor*—quasi-suspect and therefore subject to heightened, intermediate scrutiny, which the government plainly could not have satisfied.⁷² This would hardly have been a doctrinal innovation. Indeed, relying on the Supreme Court’s own precedents, this was precisely the path taken by the lower courts in *Cleburne*⁷³ and *Windsor*.⁷⁴

This strand of equal protection, no less than animus doctrine, is fundamentally sound as a matter of constitutional principle. It is supported by a longstanding body of case law, and it derives from the core historical purpose of the Fourteenth Amendment—preventing racial discrimination against the newly freed slaves—with the Supreme Court reasoning by analogy as the Court extends that purpose to other, comparable forms of discrimination.⁷⁵

67. Carpenter, *supra* note 1, at 183.

68. United States Dep’t of Agric. v. Moreno, 413 U.S. 528 (1973).

69. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

70. Romer v. Evans, 517 U.S. 620 (1996).

71. United States v. Windsor, 570 U.S. 744 (2013).

72. A ruling of this sort in *Romer* probably would have required the Court to overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986), as it later did in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

73. Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191, 195–202 (5th Cir. 1984), *aff’d on other grounds in part and vacated in part*, 473 U.S. 432 (1985).

74. Windsor v. United States, 699 F.3d 169, 180–88 (2d Cir. 2012), *aff’d on other grounds*, 570 U.S. 744 (2013); *see also* Smith Kline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 480–84 (9th Cir. 2014) (adopting heightened scrutiny for sexual-orientation classifications after finding that the Supreme Court itself applied heightened scrutiny in *Windsor*, albeit not explicitly).

75. See Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 34–35 (2014) (explaining the Court’s reasoning and summarizing its case law). I realize that the suspect and quasi-suspect strand of equal protection doctrine has been criticized, sometimes quite strongly. Professor Pollvogt, for example, has argued that it

Turning to considerations of judicial prudence, one might argue that this branch of equal protection doctrine is, or has become, unworkable. Professor Araiza, for example, cites the ubiquity of governmental classifications on various grounds and in various settings, the ever-increasing diversity of American society, and especially “[t]he crumbling of older binaries—black/white, Catholic/Protestant, and today, even male/female.”⁷⁶ But recall that the suspect and quasi-suspect strand of equal protection is being considered as an alternative to animus, which has significant workability issues of its own. The identification of suspect and quasi-suspect classifications is not an exact science, and the task may require adaptation to new circumstances. But the inquiry is not beyond the judicial ken, and, in any event, it is no less workable than animus doctrine.

In identifying suspect and quasi-suspect classifications, the Supreme Court, analogizing to race, has relied on various considerations. As I have explained elsewhere, three criteria have dominated the inquiry:

First, is the classifying trait, like race, an immutable personal characteristic—an accident of birth beyond a person’s control or responsibility—rendering it presumptively unjust for the government to use the trait as a basis for allocating rewards or penalties? Second, is the trait, like race, broadly irrelevant to legitimate generalization, rendering discrimination on this basis not only unfair but also indefensible in a wide range of governmental settings? And third, is the disadvantaged group, like African-Americans and other racial minorities, a group that lacks political power and that therefore warrants special judicial solicitude, that is, special protection from the ordinary operation of the political process?⁷⁷

works to inhibit, not promote, an appropriate evaluation of equality claims. Pollvogt, *supra* note 1, at 897–98; Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 796–98 (2014). I appreciate the force of these criticisms, but I continue to believe that this doctrine, properly understood and properly applied, is fundamentally sound as a matter of constitutional principle.

76. ARAIZA, *supra* note 1, at 130; *see id.* at 129–30 (arguing that it is increasingly difficult to make generalized, across-the-board determinations that different types of classifications warrant different levels of constitutional scrutiny); *cf.* Pollvogt, *supra* note 75, at 796 (contending that “the Court’s suspect classification jurisprudence does not present a coherent or particularly workable doctrinal framework”).

77. Conkle, *supra* note 75, at 34. This inquiry requires the Court to make judgments of fact and value, but its judgments can be informed by evolving societal values. *See id.* at 35–

Conducting an inquiry along these lines, the Court has extended suspect or quasi-suspect status—and therefore strict or intermediate scrutiny—to various nonracial classifications, including classifications based on alienage,⁷⁸ sex,⁷⁹ and illegitimacy.⁸⁰

To be sure, mental disability does not perfectly fit the Supreme Court's criteria, but it fits well enough to warrant quasi-suspect status and intermediate scrutiny, as the Fifth Circuit concluded in *Cleburne*.⁸¹ Likewise, sexual orientation meets the criteria rather well,⁸² even if the concept of immutability might require some relaxation or modification, as the Second Circuit suggested in its *Windsor* decision.⁸³ Similar reasoning, moreover, could readily be extended to gender-identity discrimination, triggering heightened scrutiny and leading to invalidation in most settings. Lower courts have already moved strongly in this direction.⁸⁴

With respect to sexual orientation, the reasoning I have suggested would have charted a clear path to the Court's marriage

36 (arguing that changing societal values properly have influenced the extension of suspect or quasi-suspect treatment to forms of discrimination that had been tolerated in the past).

78. *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

79. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *see Frontiero v. Richardson*, 411 U.S. 677, 682–88 (1973) (plurality opinion) (explaining why sex-based classifications warrant heightened scrutiny).

80. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

81. *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 191, 195–98 (5th Cir. 1984), *aff'd on other grounds in part and vacated in part*, 473 U.S. 432 (1985).

82. *See Conkle*, *supra* note 75, at 36–37 (applying the three criteria and arguing that changing societal values provide additional support for heightened scrutiny in this context).

83. The Second Circuit concluded that whether or not it is strictly immutable, “sexual orientation is a sufficiently distinguishing characteristic to identify the discrete minority class of homosexuals.” *Windsor v. United States*, 699 F.3d 169, 184 (2d Cir. 2012), *aff'd on other grounds*, 570 U.S. 744 (2013).

84. A law or policy that discriminates against transgender individuals can be seen as a form of sex discrimination, thus rendering the law or policy a quasi-suspect, sex-based classification triggering heightened, intermediate scrutiny as a matter of established doctrine. *See, e.g., Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1050–52 (7th Cir. 2017) (adopting this reasoning). Moreover, even apart from that argument, a number of courts have ruled that discrimination on the basis of transgender status, as such, is quasi-suspect or even fully suspect, leading to intermediate or even full-fledged strict scrutiny. *See, e.g., Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 749–50 (E.D. Va. 2018) (finding sex-based discrimination but also concluding that transgender classifications are “at least . . . quasi-suspect” in their own right); *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018) (finding transgender classifications fully suspect and therefore subject to “the most exacting level of scrutiny”); *id.* (“[C]ourts have consistently found that transgender people constitute, at minimum, a quasi-suspect class.”); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 208–11 (D.D.C. 2017) (finding sex-based discrimination but also concluding that transgender classifications are quasi-suspect).

equality ruling in *Obergefell v. Hodges*.⁸⁵ The Court managed to avoid animus reasoning in *Obergefell*, but its doctrinal analysis was hardly straightforward, and, as Professor Araiza has suggested, its opinion arguably relied indirectly on animus concerns.⁸⁶ In any event, the alternative doctrinal path that I have outlined—invoking heightened, intermediate scrutiny for discrimination based on sexual orientation—would have provided a more coherent and persuasive doctrinal underpinning for the Court’s decision.⁸⁷ Denying marriage rights to same-sex couples plainly cannot be justified under such scrutiny.⁸⁸

More broadly, as compared to animus doctrine, the suspect/quasi-suspect strand of equal protection is equally sound as a matter of constitutional principle, and it is no less workable. With these factors largely in equipoise, the second component of judicial prudence, that of judicial statesmanship, comes to the fore. And this consideration makes the suspect/quasi-suspect doctrine a superior and preferable constitutional rationale.

When the Court utilizes this doctrine, it determines its level of scrutiny through a generalized analysis, focusing mainly on the three criteria I have noted: immutability, general irrelevance, and political powerlessness.⁸⁹ It decides, categorically, whether classifications on a particular ground—for example, sexual orientation or gender identity—should be subject to heightened scrutiny. Historical and continuing bias and prejudice are relevant to political powerlessness, but the inquiry remains global, not specific to the law at hand. And once the Court invokes heightened, intermediate scrutiny, the law in question will be invalidated unless the government can show that the law serves an interest that is not only legitimate, but also important, and that it is well-tailored to serve that interest. Most laws will fail this test, and the Court therefore will rule them invalid.

More to the point, even if the issue of animus might be lurking, the Court will have no occasion to address it, certainly not

85. 135 S. Ct. 2584 (2015).

86. See ARAIZA, *supra* note 1, at 163–72.

87. See Conkle, *supra* note 75, at 34–38 (arguing, prior to *Obergefell*, that this line of reasoning provided the best constitutional justification for extending the right to marry to same-sex couples).

88. See *id.* at 37–38 (explaining that same-sex marriage prohibitions, even if rational, could not satisfy heightened scrutiny because they did not substantially advance important governmental objectives).

89. See *supra* note 77 and accompanying text.

explicitly. As a result, it will have no occasion to announce that the law is animus-based. Thus, even as the Court finds for the challengers, it can avoid disparaging the law's supporters with the sort of judicial indictment and moral condemnation that animus doctrine entails. Our political-cultural fires may continue to burn, but the Court will not be adding its own incendiary contribution.⁹⁰ Notably, moreover, this doctrinal path would honor judicial statesmanship without impairing equality claims. To the contrary, equality claims would be enhanced by the elimination of any requirement that a challenger present evidence of animus. Instead, any and all laws embodying the quasi-suspect classification would be subject to heightened scrutiny and probable invalidation.⁹¹

I have discussed three of the four cases in the Supreme Court's "animus quadrilogy"⁹²—*Cleburne*, *Romer*, and *Windsor*—suggesting that they could and should have been decided on other grounds. I will comment only briefly on the fourth, which, chronologically, was actually the first. In that case—*Moreno*—the Court invalidated a federal statute denying food stamps to households of unrelated individuals, including "hippies," with the Court finding that the law was tainted by animus, "a bare congressional desire to harm a politically unpopular group."⁹³

Given the statute's impact on personal decisions concerning intimate, family-like relationships, perhaps the Court in *Moreno* could have grounded its ruling on substantive due process.⁹⁴ But

90. The law's supporters will still be upset by its invalidation, of course. Cf. Carpenter, *supra* note 1, at 241 ("There is no nice way to tell people that policies they have fervently supported are unconstitutional."). But avoiding the vituperative charge of animus is no small matter.

91. Another doctrinal path to similar results might be an understanding of the rational basis test that permits its robust application, in selective contexts, without regard to animus. See Katie Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1356–64 (2018) (defending this understanding of the rational basis test and contending that the test, so understood, has permitted equal protection rulings favoring social change). Such an approach could provide constitutional protection without requiring evidence of animus or judicial findings that laws are animus-based. But such a doctrine might be difficult to defend as a matter of constitutional principle and judicial prudence. See *id.* at 1366, 1367 (noting the "unsettled, undertheorized nature of rational basis review" and the "messy absence of clear doctrine in defining where meaningful rational basis review can be applied").

92. Carpenter, *supra* note 1, at 183.

93. *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

94. Just a few years after *Moreno*, a plurality of the Court relied on substantive due process to invalidate an ordinance that precluded extended-family relatives from living together in the same house. *Moore v. City of East Cleveland*, 431 U.S. 494, 498–506 (1977).

the doctrine of substantive due process raises difficult questions of its own, both as a matter of constitutional principle and as a matter of judicial prudence.⁹⁵ In any event, if neither substantive due process nor any other alternative ground was viable and preferable in *Moreno*, then the Court's animus ruling was proper. As I have said, animus doctrine is compelling as a matter of constitutional principle, and I have not argued that it should be abandoned altogether. Rather, I have contended that it should be a doctrine of last resort, to be utilized if, but only if, there is no viable and preferable doctrinal alternative.⁹⁶

III. CONCLUSION

Rather than treat animus as a doctrine of last resort, the Supreme Court has instead suggested that laws can and should be invalidated as animus-based even when there are viable, and preferable, alternative grounds for reaching the same results. As a matter of judicial prudence, this is a mistake. Accordingly, in my judgment, the Court took a wrong turn in adopting this reasoning—if not in *Moreno*, then at least in *Cleburne*, as Justice Marshall suggested in his powerful separate opinion.⁹⁷ The Court's reliance on animus in addressing sexual orientation questions in *Romer* and *Windsor* likewise was a

(plurality opinion). In so doing, however, the plurality distinguished and preserved the Court's earlier decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), which had permitted housing restrictions affecting individuals who were not related by "blood, adoption, or marriage." *Moore*, 431 U.S. at 498 (plurality opinion). *Belle Terre* obviously would cast doubt on a substantive due process claim in the context of *Moreno*, but *Belle Terre* might have been wrongly decided. See *Belle Terre*, 416 U.S. at 16 (Marshall, J., dissenting) (arguing that even if no formal familial relationship is present, the "choice of household companions" warrants special constitutional protection because it "involves deeply personal considerations as to the kind and quality of intimate relationships within the home").

95. See generally Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63 (2006) (discussing and evaluating three competing, and inconsistent, theories of substantive due process).

96. In his classic article addressing the general propriety of judicial inquiries into constitutionally impermissible motivation, Professor Paul Brest reached a somewhat similar conclusion: "Where a court can support a judgment invalidating a decision on grounds other than unconstitutional motivation, it usually should do so. . . . [But] a blanket refusal to inquire into legislative and administrative motivation is not justified." Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 134 (footnote omitted).

97. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 455–78 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

mistake, and the Court should not repeat the error when it confronts transgender issues in the future.

As I have emphasized, my argument is not that animus doctrine is unjustified as a matter of constitutional principle. Rather, it is that animus doctrine is imprudent, as a matter of judicial discretion and judgment, if the Court could instead rely on a viable and preferable doctrinal alternative. It is imprudent in part due to workability concerns, but mainly because the Supreme Court, as a matter of judicial statesmanship, should seek to temper, not exacerbate, the political polarization and fragmentation that is tearing our society apart. The Court should avoid animus doctrine when possible because it tends to inflame our ongoing cultural conflicts, undermine civic and political discourse, and threaten the character and strength of our constitutional democracy.